

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Denial of Certification of
the Variance Granted to Robert W. Hubbard
by the City of Lakeland

**ORDER ON MOTION TO
COMPEL DISCOVERY**

The above-entitled matter came before Administrative Law Judge Kathleen D. Sheehy on the motion to compel discovery filed by the Department of Natural Resources. The motion record closed at the conclusion of a telephone conference call held on March 21, 2007.

David P. Iverson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department of Natural Resources (Department or DNR); Andrew T. Shern, Esq., Murnane Brandt, 30 East 7th Street, Suite 3200, St. Paul, MN 55101-4919, appeared for the Sierra Club; and A. W. Clapp, 757 Osceola Avenue #1, St. Paul, MN 55105, appeared for the St. Croix River Association

Scott R. Strand, Esq., 1772 Eleanor Avenue, St. Paul, MN 55116, appeared for Robert W. Hubbard; Nicholas J. Vivian, Esq., Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, 1809 Northwestern Avenue, Suite 110, Stillwater, MN 55082, appeared for the City of Lakeland.

Based on the record in this matter, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The DNR's Motion to Compel Responses to Document Request No. 4 is GRANTED; Mr. Hubbard shall provide the requested material as soon as possible.
2. The DNR's Motion to Compel with regard to its Request for Entry Upon Land for Inspection and Other Purposes is DENIED without prejudice at this time. The DNR may renew this portion of its motion if its surveyor is unable to use the survey data produced as ordered above.

Dated: March 23, 2007

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Robert Hubbard is the owner of real property on the St. Croix River that is within the regulatory boundaries set by the DNR's comprehensive master plan.¹ In this proceeding he challenges the DNR's denial of certification of a variance issued by the City of Lakeland that would permit him to construct a new home less than 40 feet from the bluffline, which is the otherwise applicable setback requirement.² In proceedings before the City Council and the DNR, Mr. Hubbard submitted survey sheets and architectural drawings based thereon depicting the location of the bluffline on his property. The DNR believes the bluffline location depicted in these documents is not accurate. The DNR requested the underlying survey data in discovery, as well as permission to access the property in order to perform its own survey. Hubbard objected to providing both the data and access requested. On March 19, 2007, the DNR brought this motion to compel.

Discussion

The Rules of the Office of Administrative Hearings, Minn. R. 1400.6700, permit any means of discovery available under the Minnesota Rules of Civil Procedure. Rule 26.02(a) permits discovery of any information reasonably calculated to lead to the discovery of admissible evidence. In a motion to compel discovery, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for the purposes of delay, and that the issues in controversy are significant enough to warrant the discovery.³

The ordinances of the City of Lakeland require a setback of 40 feet from the bluffline of the lower St. Croix River. The City's ordinance defines a bluffline as "a line along the top of a slope connecting the points at which the slope, proceeding away from the river or adjoining watershed channel, becomes less than 12 percent and it only includes slopes greater than 12% visible from the river or any water course tributary to the river." The ordinance further provides that the location of the bluffline for any particular property shall be certified by a registered land surveyor or the zoning administrator. More than one bluffline may be encountered proceeding away from the river or adjoining watershed channel. All setbacks required herein shall be applicable to each bluffline.⁴

As noted above, the DNR maintains that Hubbard's surveyor has not accurately located the bluffline. The DNR made this argument in proceedings before the Lakeland City Council, and the issue was raised in the first prehearing conference in this matter on February 14, 2007. The DNR formally requested discovery of these matters on March 1, 2007. Hubbard objects to the requested discovery, contending he has already

¹ See Minn. Stat. § 103F.351, subd. 2 (2006) (Lower St. Croix Wild and Scenic River Act).

² Minn. R. 6105.0380, subp. 5.A(2), and Lakeland Ordinance Sections 302.01(18) and 402.01(5).

³ Minn. R. 1400.6700.

⁴ City Ordinance § 301.01(3), Iverson Aff. Ex. D.

provided information about “additional sloping areas on the Hubbard property behind the designated bluffline;” the discovery is not relevant or likely to lead to the discovery of admissible evidence; and the discovery is not timely, given that the hearing is scheduled to commence on March 29, 2007.

Contrary to Hubbard’s arguments, the information sought in the Request for Production of Documents is undeniably relevant to the DNR’s case and is moreover critical evidence concerning the foundation for the drawings submitted in Hubbard’s application for the variance. This is a contested case; the record here is not limited to that provided to the Lakeland City Council. One purpose of this administrative proceeding is to more fully develop the factual record. If the requested information is not provided, Hubbard risks arguments that his own survey materials and documents based thereon should not be admitted into evidence. Under no theory of law would the DNR or the Sierra Club be precluded from challenging the accuracy of the bluffline depicted in Hubbard’s application. The responsive information should have been provided immediately, given that the hearing was scheduled, at Hubbard’s request, to take place on an expedited basis.

The Request for Entry Upon Land is similarly calculated to lead to the discovery of admissible evidence. If the DNR performed its own survey, however, it would take one week to produce a survey report, which would mean the report would not be ready until the last day of the hearing scheduled to commence next week. The DNR has indicated that it may not need to conduct its own survey if it is able to use the survey data produced in response to the Request for Production of Documents. If the DNR’s surveyor is able to use that data, the hearing could still be held on the currently scheduled days (March 29-30, 2007).⁵ Consequently, this portion of the DNR’s motion to compel is DENIED without prejudice; the DNR may renew the motion if it is unable to use the survey data in the form provided. At that time the Administrative Law Judge would consider rescheduling the hearing to take place one to two weeks later, in order to permit Hubbard time to respond to a new survey report.

K.D.S.

⁵ In the telephone conference held on March 21, 2007, Hubbard’s counsel declined the option to reschedule the hearing.